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IN THE
COURT OF APPEALS OF INDIANA

TALIA EICHELBERG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 46A05-0506-CR-362
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAPORTE CIRCUIT COURT
The Honorable Robert W. Gilmore, Jr., Judge
Cause No. 46C01-0304-MR-42

September 13, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Talia Eichelberg ("Eichelberg") pleaded guilty in LaPorte Circuit Court to Class B felony child neglect. The trial court sentenced Eichelberg to twenty years with ten years suspended. Eichelberg appeals, arguing her sentence is inappropriate. We affirm.

Facts and Procedural History

At approximately 1:00 a.m. on April 4, 2003, Eichelberg gave birth to an infant son in her bedroom. After giving birth, Eichelberg cut the umbilical cord and then fell asleep on her bedroom floor beside the baby for a couple of hours. When she awoke, she found that the baby was still breathing. She then placed a towel over the infant's face "so he couldn't breath" and held it there for fifteen to twenty minutes. Appellant's App. pp. 29-30. After suffocating the child to death, Eichelberg fell back asleep. When she awoke around 3:30 or 4:00 a.m., she wrapped the infant's body in some towels, carried him outside, and "tossed" him into the hedges by her house. Appellant's App. p. 33. The next morning, Eichelberg's parents discovered blood in her bedroom and called an ambulance.

On April 4, 2003, the State charged Eichelberg with murder. Appellant's App. p. 6. On December 17, 2004, Eichelberg pleaded guilty to Class B felony child neglect. Appellant's App. p. 8. The plea agreement stipulated that the parties would argue sentencing. Id.

The trial court held a sentencing hearing on March 23, 2005, and issued a sentence on May 11, 2005. Appellant's App. pp. 10, 48-53. In its order, the trial court found as mitigating factors that Eichelberg had pleaded guilty and acknowledged her responsibility, that she had cooperated with law enforcement during the investigation,

that she was only 18 years old at the time of the incident and suffered from a learning disability, that she was likely to respond to short term incarceration, and that incarceration of her would be extremely difficult as she can be easily manipulated. Id. As aggravating factors, the trial court found that Eichelberg was in a position of trust with her infant son and that her actions resulted in the death of her child. Id. The trial court found that the two aggravating circumstances outweighed the six mitigating circumstances and issued a sentence of twenty years with ten years suspended. Id. Eichelberg now appeals.

Discussion and Decision

On appeal, Eichelberg contends that her sentence is inappropriate.[1] Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B) (2006); Marshall v. State, 832 N.E.2d 615, 624 (Ind. Ct. App. 2005), trans. denied.

On the date Eichelberg was charged, Indiana Code section 35-50-2-5 (Supp. 2006), provided "[a] person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating

[1] We note that in her reply brief, Eichelberg challenges the validity of the aggravating factors the trial court enumerated. Reply Br. of Appellant at 1-2. Whether the trial court considered improper aggravating circumstances is a separate inquiry and reviewed under a different standard than Eichelberg's claim that her sentence is inappropriate. Noojin v. State, 730 N.E.2d 672, 678 (Ind. 2000). Because she raised the issue of the validity of the aggravating factors for the first time in her reply brief, it is waived. Ind. Appellate Rule 46(C) (2006) ("No new issues shall be raised in the reply brief."); see also Felsher v. State, 755 N.E.2d 589, 593 (Ind. 2001). Waiver notwithstanding, were we to address this issue, we would conclude that the trial court properly considered the death of the infant and Eichelberg's position of trust with the child as aggravating circumstances.

circumstances or not more than four (4) years subtracted for mitigating circumstances."[2] Eichelberg was sentenced to twenty years with ten years suspended, and therefore, she did not receive the maximum executed sentence for a Class B felony.

Concerning Eichelberg's character, the trial court found several mitigating circumstances, including her cooperation with law enforcement, her acknowledgement of her responsibility for her actions, her learning disability and her immaturity. However, at sentencing the trial court observed, "[w]hile there are clearly more mitigating circumstances than aggravating circumstances, the death of the infant and the Defendant's actions in causing that death is an overwhelming aggravating circumstance." Appellant's App. p. 51. Moreover, in a statement to police, Eichelberg admitted to holding a towel over her child's face "so he couldn't breath" for fifteen or twenty minutes. Appellant's App. pp. 29-30. She then wrapped the infant in towels and "tossed the baby in the hedge row" on the side of her house. Appellant's App. p. 23. Her statement clearly indicates her intent to suffocate her child and discard of the body. Id. We conclude that the nature of Eichelberg's offense in suffocating her child is particularly heinous, and therefore, her twenty-year sentence with ten years suspended is appropriate.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.

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[2] Between the date of Eichelberg's offense, April 4, 2003, and the date of sentencing, May 11, 2005, Indiana Code section 35-50-2-5 was amended to provide for an "advisory" sentence rather than a presumptive sentence. See P.L. 71-2005, § 8 (eff. April 25, 2005). The amendment to section 35-50-2-5 constitutes a substantive change in a penal statute and may not be applied retroactively. Therefore, in this case, we are required to apply the prior "presumptive" sentencing scheme. See Weaver v. State, 845 N.E.2d 1066, 1071-72 (Ind. Ct. App. 2006), trans. denied. But see Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005).